ORIGINAL COPY

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975
No. 75-5800

CARL RAY SONGER,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO State of Florida
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

ROBERT L. SHEVIN
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COUNSEL FOR RESPONDENT

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CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Florida sought to be reviewed is Songer v. State of Florida, ___So.2d___, Case No. 45,584 (Fla.Sup.Ct., September 3, 1975) (Exhibit I).

JURISDICTION

Respondent concedes that jurisdiction is properly being sought pursuant to 28 U.S.C. §1257(3) and to the extent that substantial federal questions are presented, this Court can exercise jurisdiction.

QUESTIONS PRESENTED

The questions posed by Petitioner at page two of his petition are acceptable to Respondent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent agrees that the constitutional and statutory provisions which may be involved in the cause are as Petitioner represents in his petition at pages three through eight.

STATEMENT OF THE CASE AND FACTS

Upon his conviction of murder in the first degree, Petitioner was adjudicated guilty of murder in the first degree and sentenced to death by the Circuit Court of the Ninth Judicial Circuit of Florida, in and for Osceola County, Florida. On direct appeal to the Supreme Court of Florida, the Circuit Court's judgment and sentence of Petitioner were affirmed. Petitioner now brings a petition for writ of certiorari in this Court to review the decision of the Supreme Court of Florida entered on September 3, 1975. Respondent accepts the statement of the facts of this case as set out at pages one through three of the opinion of the Florida Supreme Court. (Exhibit I)

REASONS WHY THE WRIT SHOULD ISSUE

Respondent agrees that a writ of certiorari should issue on the basis of the first question raised by Petitioner, but does not agree that a writ should issue on the basis of the second question.

POINT I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH

FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF FLORIDA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT

In light of the questions left unanswered by this Court in Furman v. Georgia, 408 U.S. 238 (1972), and the recent action taken in Fowler v. North Carolina, Case No. 73-7031 restoring said case to the oral argument calendar, 43 L.W. 3674, June 23, 1975, it would be frivolous for the undersigned counsel or the State of Florida to suggest that this case does not present a substantial federal question with regard to the validity of Florida's death penalty statute and the sentence imposed herein pursuant thereto.

Accordingly, the State of Florida concedes that this federal question, duly raised and passed upon by the Supreme Court of Florida, requires consideration by this Court so that it may authoritatively dispose of the merits of this issue. It should be noted that the position of the State of Florida is, and will be, that the statutes involved and the judgment and sentence entered in accordance therewith are valid in all respects.

Respondent respectfully urges this Court to accept jurisdiction as to this question; to enter an order directing the parties to file their respective briefs on the merits; and to set the cause for oral argument before the court during the October term.

POINT II

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER NONDISCLOSURE OF A

"CONFIDENTIAL" PORTION OF A PRESENTENCE INVESTIGATION REPORT TO A DEFENDANT CONVICTED OF A CAPITAL OFFENSE CONSTITUTES A VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT

Petitioner contends that the trial judge erred in not disclosing to him the full contents of the presentence investigation report which the trial judge considered prior to imposing the death penalty on Petitioner. Petitioner suggests that such nondisclosure constitutes a violation of the right to counsel and due process as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, respectively. However, the record does not reveal that Petitioner objected in the trial court to the "limited disclosure" of the presentence investigation report. Moreover, an examination of Petitioner's assignments of error (attached as Exhibit II) and appellate briefs (a portion of which is attached as Exhibit III) reveal that this constitutional question was never raised in the Supreme Court of Florida. Accordingly, this Court is without jurisdiction to consider Petitioner's second question. See Cardinale v. Louisiana, 394 U.S. 437 (1969), in which it is stated that:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet 368, 9 L. Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet 368, 391, 9 L Ed 458, 467. The Court has consistently refused to decide federal constitutional issues raised

here for the first time on review of state court decisions both before the Crowell opinion, Miller v. Nicholls, 4 Wheat 311, 315, 4 L Ed 578, 579 (1819), and since, e. g. Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc., 360 US 334, 342, n. 7, 3 L Ed 2d 1280, 1286, 79 S Ct 1196 (1959); [other citations omitted].

"In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 USC §1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v. Ohio, 385 US 92, 17 L Ed 2d 189, 87 S Ct 252 (1966), they should be given the first opportunity to consider them."

As to the issues which Petitioner did present to the Supreme Court of Florida, the only question relating to the presentence investigation report was whether the trial judge's consideration of that report was in violation of a state statute and state rule of criminal procedure pertaining to sentencing proceedings in capital cases. To the extent that this question may involve constitutional considerations, it has been previously answered in principle by this Court in Williams v. New York, 337 U.S. 241, 252 (1949). There, it was concluded that:

> "We cannot say that the due-process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence."

Cf. Rule 32 (c)(2), Federal Rules of Criminal Procedure; Gregg v. United States, 394 U.S. 489 (1969); United States v. Frontero,

452 F.2d 406, 410 (5th Cir., 1971).

CONCLUSION

Point I involves a substantial federal question which merits review by this Court. Point II involves a federal question which was never raised or decided in the Supreme Court of Florida. Thus, this Court does not have jurisdiction as to Point II, and review in this case if granted, should be limited to a consideration of the constitutionality of the death penalty statutes of the State of Florida.

Respectfully submitted,

ROBERT L. SHEVIN
ATTORNEY GENERAL

Gerald D. Knight

GERALD L. KNIGHT
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THE CAPITOL
TALLAHASSEE, FLORIDA 32304

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to the Petition for Writ of Certiorari to the Supreme Court of Florida has been forwarded to Petitioner's Counsel, Charles H. Livingston, Esquire, Special Assistant Public Defender, 2168 Main Street, Sarasota, Florida, 33577, by mail, this 31st day of December, 1975.

Gerald D. Knight

OF COUNSEL

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JULY TERM, 1975

CARL RAY SONGER, a/k/a ROBERT BERRY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 45,584

Circuit Court Case No. 74-27

* * * * * * * * * * * * * * * * * *

Opinion filed September 3, 1975

An Appeal from the Circuit Court in and for Osceola County, John W. Booth, Judge

James A. Gardner, Public Defender; and Charles H. Livingston, Special Assistant Public Defender, for Appellant

Robert L. Shevin, Attorney General; and Gerry B. Rose, Assistant Attorney General, for Appellee

CREWS, JOHN J, Circuit Judge.

This cause comes before this Court on direct appeal from a conviction of murder in the first degree and a sentence of death imposed on Appellant in the Circuit Court of Osceola County. Jurisdiction vests in this Court pursuant to Article V, Section 3(b)(1), Florida Constitution. The facts of the cases are as follows.

At approximately 6:00 A.M. on the cold morning of December 23, 1973, hunters looking for dogs observed an automobile with its motor running, parked on a gravel road about fifty yards from U. S. Highway 19 near Crystal River, in Citrus County, Florida. They approached the car, knocked on the window of the passenger side and spoke to one, Ronald Jones, who raised up from a prone position on the front seat. The Appellant was lying down on the

rear seat with his face toward the front. Although he did not sit up or speak to them, Appellant's eyes were opened and he appeared to be listening to the conversation about dogs going on between one of the hunters, in the presence of the other, with Jones.

Between 8:30 and 9:00 A.M. two other hunters were about thirty feet behind Trooper Ronald G. Smith of the Florida Highway Patrol when he stopped to check the parked vehicle. These hunters saw Smith approach the car, talk with Jones, search Jones at the rear of the auto, and return to the car with his hand on his pistol. Thereupon, Smith leaned into the car. Suddenly, a fusillade of shots occurred, after which the officer was dead (death resulted from a loss of blood due to four bullet wounds in deceased's upper body plus a wound in one knee). The Appellant came out of the back seat of the automobile, shot once toward the hunters, jumped back inside the car and with Jones driving, attempted to make his getaway.

One of the hunters, armed with a 308 semi-automatic rifle, shot certain tires out on the moving automobile causing it to stop. Its occupants attempted to escape by running, but after Jones was shot in the foot by one of the hunters, the Appellant advisedly surrendered, holding his hands with his pistol in one over his head and upon being so ordered, tossed the pistol over the car. The hunters then called for help on the Trooper's radio.

Appellant testified at trial that, at the time of the shooting, he was under the influence of drugs and that he woke to find a "vision"--an arm that was pulling him,--so he rolled to the floor of the car where he got his single action gun and fired repeatedly at the vision. After the shooting, it was found that Appellant's gun contained six empty cartridges, while all six cartridges in Trooper Smith's pistol had also been fired.

At the jury trial which was held for the 23-year-old Appellant, a pathologist testified regarding the location of certain bullet wounds, and later, in his closing argument, the prosecutor referred to certain pathological evidence to convince

the jury of Appellant's guilt. The jury returned a verdict of guilty of premeditated murder with a recommendation that Appellant be executed. The trial court entered its written Findings of Fact in support of the death penalty and sentenced Appellant to be electrocuted. In its Findings of Fact, the court relied on a Presentence Investigation Report (PSI) which showed that Appellant had committed various non-violent crimes (two instances of auto theft and one forged check case) and concluded that there were aggravating, rather than mitigating, circumstances in this fatal shooting.

While Appellant admits that he is guilty to some degree of homicide, he questions the sufficiency of the circumstantial evidence sub judice to support a finding of premeditation.[1] Appellant further concedes that the duration of the premeditation is immaterial so long as the murder results from a premeditated design existing at a definite time to murder a human being;[2] nevertheless, he argues that the evidence shows that he was surprised when suddenly awakened by the trooper and that he was so intoxicated by drugs that he could not form the mental state required to premeditate the shooting.[3] Based on this reasoning, Appellant concludes that the evidence is legally insufficient to support a jury verdict of first degree murder. We disagree. The record shows: that Appellant had absconded from the Oklahoma authorities, and, logically, could have been avoiding arrest; that the trooper leaned over the front seat to wake a supposedly sleeping person; that Appellant was sufficiently alert to accurately shoot the trooper four out of four shots from a single-action pistol which he had to "fan"

[1] Hill v. State, 133 So.2d 68 (Fla. 1961); Thompson v. State, 276 So.2d 218 (Fla. App. 1973), cert. den. 281 So.2d 210.

[2] Snipes v. State, 154 Fla. 262, 17 So.2d 93 (1944).

[3] Britts v. State, 158 Fla. 839, 30 So.2d 363 (1947).

for rapid fire--while lying on the floor of the back seat of the automobile; that the trooper suffered multiple wounds in such rapid succession that he did not have time to take defensive action until he had been shot at least once; and that there was testimony that contradicted Appellant's contention that he was under the influence of drugs. This meets with criteria relating to premeditation that was suggested in Larry v. State.[4] Recognizing the established principle that, where a jury's verdict is supported by competent substantial evidence, an appellate court should not substitute itself as the trier of the fact,[5] we accept the jury's evaluation of the evidence; in doing so, we specifically reject Appellant's contention that a defendant's interpretation of circumstantial evidence should be accepted completely unless it is specifically contradicted.

We also reject Appellant's contention that remarks made by the prosecutor in closing argument constitute reversible error. Certain statements, though incorrectly attributed by the State Attorney to the pathologist, did have a basis in the trial record. Furthermore, Appellant is precluded from asserting this argument since he failed to object at trial to the allegedly improper prosecutorial comment.[6] Moreover, the prosecutor's possibly inappropriate use of medical terminology, and the conflicts concerning the angles of the wounds and size of neck wound are not such decisive factors that would justify, not to mention, require a finding of fundamental error by this Court.

When the death penalty has been imposed, this Court has a separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted.[7] An examination of the record in this case discloses the following aggravating

[4] 104 So.2d 352 (Fla. 1958).

[5] Harrell v. State, 245 So.2d 302 (Fla. App. 1971).

[6] State v. Jones, 204 So.2d 515 (Fla. 1967).

[7] State v. Dixon, 283 So.2d 1 (Fla. 1973) U.S. cert. den. in consolidated case (Hunter), 40 L.Ed.2d 295.

circumstances as recognized by statute:[8] (1) at the time he killed the patrolman, Appellant was under a three-year sentence of imprisonment for the larceny of an automobile; (2) while serving such sentence, Appellant escaped from the Oklahoma prison system and, at the time of the fatal shooting, was a fugitive from the law; (3) Appellant shot Trooper Smith while he was in uniform, on active duty, and making a routine inspection of an apparently abandoned vehicle, all of which was a lawful exercise of a governmental function. In relating the statutorily enumerated mitigating circumstances[9] to the instant case, even Appellant admits that there are only three which possibly apply, i.e., youth, intoxication and insignificant prior history of criminal activity. We have supplied these standards to Appellant and have found them to be inapplicable: (1) youth: Appellant is 23 years old, and today one is considered an adult responsible for one's own conduct at the age of 18 years; (2) intoxication: there is sufficient evidence to justify the jury's finding that Appellant was not so intoxicated as to be unaware of what he was doing; and (3) Appellant's three prior felony convictions which fall between the extremes mentioned in Dixon[10] and which are not so insignificant as to ignore them. Thus, we agree with the trial court that there are no mitigating circumstances sub judice.

As for Appellant's objection to the trial court's consideration of the presentence investigation report, we find no error in that consideration, which in fact is authorized by Rule 3.710, Rules of Criminal Procedure, that supplements Section 921.141, Florida Statutes. We observe that Appellant did not object to such consideration and that he received a copy of the PSI and had the opportunity to rebut it prior to sentencing

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[8] Section 921.141(3), Florida Statutes, now Section 921.141(5), Florida Statutes.

[9] Section 921.141(4), Florida Statutes, now Section 921.141(6), Florida Statutes.

[10] See Note 7, supra.

While it is true that Section 921.141, Florida Statutes, does not provide specifically for the consideration of a PSI report, it is our view that the statute should not be so strictly construed as to prevent the consideration of a document authorized by the Rules to be considered.[11]

In his final point on appeal, Appellant requests this Court to reconsider its decision in Dixon[12] on two grounds, i.e., that the procedure by which he was condemned to death is unconstitutionally discretionary and that the death penalty is per se cruel and unusual punishment and, therefore, unconstitutional.[13] We disagree. In our view, the reasoning in Dixon answers these objections, and we find no cause for receding therefrom.

The Appellant having failed to demonstrate reversible error, his conviction for murder in the first degree and sentence of death are hereby affirmed.

It is so ordered.

ADKINS, C.J., ROBERTS and OVERTON, JJ.; and LEE and McCRARY, Circuit Judges, Concur

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[11] Cf. Davis v. State, 297 So.2d 289 (Fla. 1974).

[12] See Note 7, supra.

[13] Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 246, 92 S.Ct. 2726 (1972).

IN THE CIRCUIT COURT, IN AND FOR OSCEOLA COUNTY, FLORIDA.

STATE OF FLORIDA,

Plaintiff,

CASE NO. 74-27

VS.

CARL RAY SONGER, a/k/a
ROBERT BERRY,

Defendant.

ASSIGNMENTS OF ERROR

Defendant, Carl Ray Songer, a/k/a Robert Berry, by and through his undersigned counsel, files these assignments of error intended to be relied upon in the Supreme Court of Florida as follows:

1. The verdict is contrary to law.

2. The verdict is against the manifest weight of the evidence.

3. The verdict is contrary to law and against the manifest weight of the evidence.

4. The court and the clerk of the court erred in administering the oath to potential jurors on voir dire examination by giving the wrong oath and then subsequently regiving the appropriate oath after voir dire questions had been propounded and, further, by then administering additional oaths to each of the prospective jurors as each was called for voir dire examination.

5. The court erred in denying defendant's motion for a judgment of acquittal as to first degree murder.

6. The court erred by permitting the prosecutor to read in closing argument from the pathologist's report because the pathologist's report was not in evidence.

7. The court erred in instructing the jury about the legal requirements of circumstantial evidence.

EXHIBIT II

8. The court erred in entering judgment of first degree murder against the defendant.

9. The court erred in rendering its findings of fact in support of the death penalty because the court considered factors not based upon the record of the trial and the sentencing proceedings in contravention of Fla. Stat. §921.141(3).

10. The court erred in ordering and considering the pre-sentence investigation of defendant.

11. The court erred in ignoring mitigating circumstances specified in Fla. Stat. §921.141(7).

12. The court erred in determining that there were no mitigating circumstances in its findings of fact in support of defendant's death sentence.

13. The court erred in sentencing defendant to death pursuant to Fla. Stat. §§775.082, 782.04, 921.141 because those statutes contravened the Florida and United States Constitutions by depriving defendant of due process and equal protection of the laws and by providing for cruel and unusual punishment in authorizing the death sentence of defendant.

14. The court erred in denying defendant's motion for new trial.

Respectfully submitted,

Charles H. Livingston

CHARLES H. LIVINGSTON
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and were not aggravating crimes such as armed robbery, assault with intent to murder, aggravated assault or rape.* The non-violent nature of appellant's past criminality was thus a clearly proven mitigating circumstance.

A trial court must not impose a death sentence without "weighing the aggravating and mitigating circumstances". Fla. Stat. §921.141(3). Mitigating circumstances, like aggravating ones, must be viewed "in light of the totality of the circumstances present". Dixon v. State, supra at 10. Accordingly, proof of mitigating circumstances cannot be ignored. The court's failure to even consider, weigh or recognize the mitigating circumstances in this case taints the entire sentencing proceeding and requires reversal of appellant's sentence.

B

A SENTENCING COURT CANNOT PROPERLY CONSIDER A PRE-SENTENCE INVESTIGATION REPORT IN A CAPITAL CASE, ESPECIALLY WHEN THE PRE-SENTENCE INVESTIGATION REPORT IS NOT AVAILABLE FOR REVIEW BY THIS COURT.

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*Had appellant's prior criminal history been significant in terms of violence, the state would surely have presented that record as an aggravating circumstance pursuant to Fla. Stat. §921.141(6)(b)

EXHIBIT III

A sentencing court's written findings of fact are to be "based upon the circumstances in sub-sections (6) and (7) and based upon the records of the trial and the sentencing proceedings". Fla. Stat. §921.141(3). Fla. Stat. §921.141(6) provides that "aggravating circumstances shall be limited to" the enumerated aggravating circumstances. And this court has held that the purpose of the statute is to require the sentencing judge "to view the issue of life or death within the framework of rules provided by the statute". The statute, however, does not mention pre-sentence investigation reports anywhere. Both Dixon, supra and Taylor, supra, also fail to mention the use of any pre-sentence investigation reports.

Nonetheless, the court below immediately ordered a pre-sentence investigation report following the jury verdict of guilty. (R. 431) The court noted receipt of a pre-sentence investigation report on the defendant the next day (R. 485) as well as receipt by trial counsel for the state and appellant of "a copy of that portion thereof to which they are entitled". (R. 485) See also R. 450. The court expressly reviewed "the factual information contained in said pre-sentence investigation." (R. 485)

The court's consideration and review of the p.s.i. report invalidated the sentence in this cause by taking the sentencing process out of the bounds established by Fla. Stat. §921.141.

The p.s.i. report is not available for the record [see footnote p. 33 above] and cannot be reviewed by appellant, his counsel, or, more importantly, this Court. Consequently, the judicial review established by Fla. Stat. §921.141 and emphasized by this court in Dixon is impossible. Moreover, the allegations contained in the p.s.i. report are subject to no standard of proof even though aggravating circumstances "must be proved beyond a reasonable doubt before being considered" by a sentencing judge. Dixon, supra at 9.

Fla. R. Cr. P. 3.710 does not pertain to the instant case because the rule is designed for cases in which "the court has discretion as to what sentence may be imposed". Fla. R. Cr. P. 3.710; see also 1972 Committee Note to Fla. R. Cr. P. 3.710. Since the only discretion afforded a judge in a capital case is whether to order death pursuant to Fla. Stat. §921.141 or life imprisonment as afforded by Fla. Stat. §775.082, the usual discretion available to the Parole and Probation Commission and a sentencing judge does not exist in capital cases.

Appellant's trial counsel did not object to the ordering or consideration of the pre-sentence investigation report, but a judicial error which might well be a deciding factor in a death case is reviewable as fundamental error despite the failure to object. (F.A.R. 3.7i, 6.16a). Further, Fla. Stat. §921.141

in providing for an automatic and meaningful review by this court of a capital conviction and sentence mandated meaningful review of the sentencing proceedings regardless of trial counsel's failure to timely object to serious error.

The court's careful consideration of the factual allegations in the p.s.i. report was not founded on either the statute or State v. Dixon, supra. The court's utilization of the p.s.i. report thereby fatally tainted this capital proceeding.

IV

THE IMPOSITION OF A DEATH SENTENCE PURSUANT TO FLA. STAT. §§775.082, 782.04 AND 921.141 CONTRAVENES THE UNITED STATES AND FLORIDA CONSTITUTIONS.*

Appellant respectfully requests this court to reconsider State v. Dixon, supra. Appellant urges reconsideration on two grounds: the procedure by which appellant was condemned to death is unconstitutionally discretionary; and the death penalty is per se cruel and unusual.

*Raised by assignment of error 13:
"13. The court erred in sentencing defendant to death pursuant to Fla. Stat. §§775.082, 782.04, 921.141 because those statutes contravened the Florida and United States Constitutions by depriving defendant of due process and equal protection of the laws and by providing for cruel and unusual punishment in authorizing the death sentence of defendant."